IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0518

STATE OF MONTANA,

Plaintiff and Appellee,

v.

THOMAS HAMILTON McCLELLAND,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Twenty-First Judicial District Court,
Ravalli County, The Honorable Jeffrey H. Langton, Presiding

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STATEMENT OF THE ISSUES

1. Did the district court abuse its discretion when it prohibited the Defendant/Appellant from cross-examining one of the State's eyewitnesses about conduct that led to a conviction for issuing bad checks in Washington State ten years earlier?

2. Did the district court commit plain error under the Confrontation Clause when it prohibited the Defendant/Appellant from cross-examining one of the State's eyewitnesses about conduct that led to a conviction for issuing bad checks in Washington State ten years earlier?

3. Was the Defendant/Appellant denied the effective assistance of counsel by trial counsel's failure to raise additional arguments when cross-examination of the State's witness was limited, or by his failure to ensure that a proposed defense witness appear for trial?

4. Does cumulative error require reversal?

STATEMENT OF THE CASE

Defendant/Appellant Thomas McClelland (McClelland) was convicted of felony assault with a weapon and misdemeanor criminal mischief following a two-day jury trial. (Appellant's App. 3 at 2.) He was sentenced to a suspended five-year commitment to the Department of Corrections for the felony conviction

and seven days in the Ravalli County Detention Center for the misdemeanor conviction. (Id.)

McClelland appeals his convictions. (D.C. Doc. 72.)

STATEMENT OF FACTS

On October 28, 2007, McClelland hit Mathias Tallis (Tallis) in the head with his cane, causing about a two-inch gash that bled profusely and required emergency medical care, including staples to close the wound. (Trial Tr. at 119-20, 183, 192; State's Ex. 3 and 4.) McClelland also tore down a "Slow" sign that Tallis had posted on his property. (Trial Tr. at 112-14; State's Ex. 1 and 2.)

McClelland and Tallis lived along the same road, Dugout Gulch, but did not know each other prior to that date. (Trial Tr. at 99, 291-92.) On that date, McClelland drove his four-wheeler to a spot on Dugout Gulch, a private road that passed through Tallis's property. (Trial Tr. at 101, 112, 296-97.) McClelland testified that he went to "see what was done with the road" because he had been told that Tallis had installed some "berms" or "water bars" that blocked the road. (Trial Tr. at 293-96.)[1]

[1] Deputy Sheriff Pease testified: "I was led to believe that the excavator was coming out the next day to knock them down." (Trial Tr. at 227.)

Tallis was on his porch and saw McClelland park his four-wheeler on one of the berms, in the middle of Dugout Gulch. (Trial Tr. at 112.) He yelled to ask McClelland if he needed any help. (Id.) McClelland got off the four-wheeler, went to a "Slow" sign that Tallis had posted on his fence, and started hitting it with his cane. (Trial Tr. at 113.) After hitting it, McClelland grabbed it with both his hands and started twisting the sign. (Trial Tr. at 113-14.) Eventually, he ripped the sign off and threw it on the ground. (Trial Tr. at 114.) Tallis's wife, Wendy Tallis (Wendy), had come outside onto the porch when she heard Tallis and McClelland yelling at each other, and saw McClelland rip the sign off. (Trial Tr. at 181.)

After McClelland ripped the sign off, Tallis started walking off his porch toward McClelland. (Trial Tr. at 114.) Wendy took a photograph of the scene at that point, which was introduced into evidence. (Trial Tr. at 174, 180-81; State's Ex. 1.) The picture showed the sign on the ground, Tallis striding across his yard in McClelland's direction, and McClelland heading toward the road that passed in front of Tallis's house, which served as his driveway. (State's Ex. 1.) By this point, both McClelland and Tallis were yelling. McClelland was swearing and saying "you don't know who you're messing with," and Tallis was telling McClelland that he was trespassing and should leave. (Trial Tr. at 116-17.)

McClelland and Tallis met across the wire fence along Tallis's driveway/road. (Trial Tr. at 118-19.) Tallis kept repeating that McClelland was trespassing, and McClelland kept saying that Tallis did not own the property he was standing on. (Trial Tr. at 118-19.) Tallis turned away from McClelland to point to where the sign was lying on the ground, and said "That sign you just tore off is my property." (Trial Tr. at 119.) As Tallis was turning, McClelland lifted his cane and hit Tallis on the side of the head. (Trial Tr. at 119, 185.)

Tallis did not realize he was bleeding at first, and continued to tell McClelland to get off his property. (Trial Tr. at 120-21.) McClelland crossed over to the other side of the driveway/road, tried to tear a fence post down, and picked up a large rock. (Trial Tr. at 121, 187, 232-33.) At that point, Tallis called to his wife to get a shotgun. (Trial Tr. at 122.) McClelland threw the rock down on the ground, and eventually returned to his four-wheeler and drove away. (Trial Tr. at 121, 187.) Wendy never actually got a shotgun; she was calling 911. (Trial Tr. at 122, 186-88; State's Ex. 18 at 2-8.) The entire incident lasted about ten minutes. (Trial Tr. at 122.)

The Tallis's fourteen-year-old daughter was in her room when the incident started, but came downstairs when her mother yelled at her to bring the phone down. (Trial Tr. at 232.) She observed her father walking toward McClelland and saw McClelland hit her father across the fence with the cane, cross the

driveway/road, try to remove a fence post, pick up a rock, and eventually leave. (Trial Tr. at 232-34.)

At the time of the incident, the Tallis's neighbor, Corrine Anderson (Anderson), was on her deck, which was on a hill overlooking the Tallis's house, porch, and yard. (Trial Tr. at 245-46; Defendant's Ex. A.) Anderson heard the yelling between McClelland and Tallis, saw McClelland rip the sign down, saw Tallis approach the fence, and saw McClelland hit Tallis with the cane. (Trial Tr. at 251-55.) Anderson yelled something like "Hey, there's other ways to handle this." (Trial Tr. at 255.) McClelland eventually left. (Trial Tr. at 255.)

At the heart of the argument between Tallis and McClelland was the question of easements. Tallis claimed ownership of the portion of Dugout Gulch where McClelland stopped his four-wheeler, but acknowledged that others had the right to "egress and ingress" over it. (Trial Tr. at 144-45.) Tallis also claimed ownership of the driveway/road on which McClelland was standing when he hit Tallis, but McClelland introduced evidence that Tallis was in a legal dispute with other neighbors over access to that driveway/road. (Trial Tr. at 140, 143-44, 312-14.)

McClelland took the stand in his own defense. (Trial Tr. at 290-340.) He testified that he tore down the "Slow" sign on Tallis's property in order to "[j]ust intimidate him to keep him away from me." (Trial Tr. at 299.) He testified that he

swung his cane at Tallis because "[h]e was going under the fence between the two wires" and "[h]e wasn't coming through the fence if I could help it. I didn't know what else to do. I have a right to self-defense in this country." (Trial Tr. at 301.) McClelland testified further: "I don't know that I hit him. I think he hit his head on the insulator on the fence post." (Trial Tr. at 303.)

When faced with numerous inconsistencies between his trial testimony and statements he had made to law enforcement officers on the day of the confrontation, McClelland claimed that one of the officers "was four inches from my face screaming in my face" and that his blood pressure was very high at the time. (Trial Tr. at 303, 317-24, 328-34.) One of the law enforcement officers who had interviewed him testified that even on the day of the confrontation "[McClelland's] stories were numerous and varied." (Trial Tr. at 208.)

McClelland offered the testimony of his caretaker to the effect that he was "visibly upset" when he returned from the confrontation, and that he called 911. (Trial Tr. at 285-86.) Paramedics and law enforcement officials responded, and, for part of the time, the paramedics were examining McClelland at the same time that law enforcement officials were questioning him. (Trial Tr. at 287-88; State's Ex. 12 at 7-8, 10.) McClelland had no injuries. (Trial Tr. at 216.)

All of the witnesses to the confrontation other than McClelland testified that Tallis did not attempt to cross the fence or threaten McClelland in any way. (Trial Tr. at 120, 186, 236, 255-57.)

SUMMARY OF THE ARGUMENT

1. The district court did not abuse its discretion when it prohibited McClelland from cross-examining Wendy Tallis about a ten-year-old conviction for issuing bad checks in Washington State, finding that issuing bad checks is not an indicator of dishonesty under Montana law. Washington's designation of the crime as a "crime of dishonesty" is not binding on Montana courts, and should not be followed. This Court has explicitly rejected the idea that theft and burglary indicate dishonesty and can be used to impeach a witness. State v. Gollehon, 262 Mont. 1, 16, 864 P.2d 249, 259 (1993). Issuing a bad check is analogous conduct, and the idea that such conduct can be used to impeach a witness should also be rejected.

2. Nor did the district court commit plain error under the Confrontation Clause by precluding such cross-examination. Trial judges retain wide latitude under the Confrontation Clause to impose reasonable limits on cross-examination. The trial judge's decision in this case imposed a reasonable limit under a

traditional evidentiary rule (Rule 608(b)) that is familiar and unquestionably constitutional.

3. McClelland was not denied the effective assistance of counsel. Sue Swenson, the neighbor whose alleged testimony only became relevant shortly before trial when Anderson was added as a witness, had agreed to appear voluntarily, but then failed to show up. Under the circumstances, defense counsel's failure to subpoena her did not fall outside the wide range of professionally competent assistance. Trial counsel often choose not to subpoena a willing witness in order to avoid the possible intimidating effect. Furthermore, McClelland has failed to show a reasonable probability that the outcome would have been different had Swenson testified.

Nor did defense counsel's failure to raise additional legal arguments in favor of allowing impeachment of Wendy Tallis with her bad check conduct fall outside the wide range of professionally competent assistance. The additional legal arguments were without merit. Furthermore, there is no reasonable probability that the outcome of the trial would have been different had the jury known that Wendy, just one of four eyewitnesses, had written some bad checks ten years earlier.

4. There having been no error, the doctrine of cumulative error is inapplicable. In any event, the photographic and physical evidence clearly supported Tallis's version of events, not McClelland's version, which was filled

with internal inconsistencies. Even if erroneous, the inability to introduce the type of weak impeachment evidence that McClelland now proffers against Wendy and Anderson would be harmless individually and cumulatively.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT PROHIBITED McCLELLAND FROM CROSS-EXAMINING ONE OF THE STATE'S EYEWITNESSES ABOUT CONDUCT THAT LED TO A CONVICTION FOR ISSUING BAD CHECKS TEN YEARS EARLIER.

A. Standard of Review

This Court reviews evidentiary rulings for abuse of discretion. State v. Bonamarte, 2009 MT 243, ¶ 13, 351 Mont. 419, 213 P.3d 457. A court abuses its discretion if it acts arbitrarily or unreasonably, and a substantial injustice results. Id. The burden to demonstrate an abuse of discretion is on the party seeking reversal of an unfavorable ruling. State v. Griffin, 2007 MT 289, ¶ 10, 339 Mont. 465, 172 P.3d 1223.

B. Background

The State filed a motion in limine prior to trial, asking that McClelland be precluded "from mentioning or raising the topic of Wendy Tallis' criminal history. Ms. Tallis was convicted of improper issuance of bank checks in the State of Washington in 1998." (D.C. Doc. 40.) McClelland responded:

> The defense agrees that the present state of the law precludes the defense from raising any conviction Ms. Tallis may have received from prior conduct. It is, however, permissible to raise the conduct itself in order to raise an issue of the witness' character for truthfulness or untruthfulness. *State v. Martin*, (1966), 279 Mont. 185, 926 P.2d 1380, 53 St. Rep. 1109, M.R. Evid. 608 (b).

(D.C. Doc. 48 at 1.)

Two days later, the district court, in a written opinion discussing this Court's precedent in State v. Martin, 279 Mont. 185, 926 P.2d 1380 (1996) and State v. Gollehon, 262 Mont. 1, 864 P.2d 249 (1993), concluded: "Defendant has not shown how the improper issuance of bank checks is an indicator of dishonesty. Accordingly, Rule 608(b) is inapplicable here, and the State's motion should be granted." (Appellant's App. 1 at 2-3.)

C. Discussion

Rule 608(b) of the Montana Rules of Evidence provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Mont. R. Evid. 608(b) (emphasis added). The Commission Comments to this rule state:

> The subdivision . . . contains the . . . safeguard that the discretion of the court will determine whether a specific instance will be used at all.

> The court must consider the admissibility of this type of evidence, like any other impeaching evidence, under Rules 401 and 403. . . . The Commission intends to change Montana law only to the extent that specific instances of conduct probative of truthfulness or untruthfulness and weighed by the trial court will be admissible.

Commission Comments, Mont. R. Evid. 608(b) (emphasis added).

Thus, despite McClelland's efforts to characterize the court's evidentiary determination as one requiring de novo review (Appellant's Br. at 23-24), it is clear under the rules that the permissibility of cross-examination regarding specific instances of conduct for the purpose of attacking a witness's credibility lies within the sound discretion of the trial court, and therefore is subject to review for abuse of discretion. State v. Sheehan, 2005 MT 305, ¶ 18, 329 Mont. 417, 124 P.3d 1119.

In this case, the district court found, in its discretion, that Wendy's conduct in issuing bad checks was not sufficiently "probative of . . . untruthfulness" to permit cross-examination about that conduct as an impeachment tool. McClelland argues that this "weighing" by the trial court was incorrect as a matter of law, because Washington state courts, interpreting their Rule 609 of the Washington Rules of Evidence, have found that the crime of unlawful issuance of a bank check "involves dishonesty." Appellant's Br. at 25 (quoting State v. Smith, 786 P.2d 320, 322 (Wash. Ct. App. 1990), overruled on other grounds, State v. Thomas, 989 P.2d 612, 614-15 (Wash. Ct. App. 1999)).

Smith has no persuasive value in Montana. Smith interpreted Washington's Rule 609(a)(2), not Rule 608(b). Washington's Rule 609 is completely different from Montana's. In Washington, Rule 609 provides that evidence of conviction of certain crimes "shall be admitted" for the purpose of attacking the credibility of a witness if the crime "involved dishonesty or false statement." Wash. R. Evid. 609(a)(2).[2] In contrast, Montana's Rule 609 provides that evidence of conviction of a crime "is not admissible" for the purpose of attacking the credibility of a witness. Mont. R. Evid. 609. Montana's Rule 609 is unique. State v. Martin, 279 Mont. 185, 200, 926 P.2d 1380, 1390 (1996) (quoting State v. Gollehon, 262 Mont. 1, 16, 864 P.2d 249, 259 (1993)). Therefore, cases from other jurisdictions interpreting Rule 609 are simply not helpful.

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[2] Wash. R. Evid. 609 also provides:

> (b) *Time limit.* Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

Given that limitation, it is doubtful that Wendy's conviction would have been admissible even under Washington law.

Even if Montana's Rule 609 were similar to that of the federal government and other states, and even if this case involved an interpretation of Rule 609, Smith would not be determinative of McClelland's case. Assuming that McClelland is correct that Washington would designate Wendy's crime as a "crime of dishonesty," that designation is not binding on Montana for purposes of Rule 609. See Kunz v. DeFelice, 538 F.3d 667, 675 (7th Cir. 2008) (state's designation of Illinois conviction for theft as "crime of dishonesty" not binding in federal court).

The reason such designations are not binding in other jurisdictions is illustrated well by this case. Smith relied on a line of Washington cases that is in direct contradiction to rulings of this Court. In Smith, the Washington Court of Appeals relied on previous Washington rulings that "theft crimes are per se admissible for impeachment purposes." Smith, 786 P.2d at 322 (citing State v. Brown, 782 P.2d 1013, 1031 (Wash. 1989)). In State v. Gollehon, by contrast, this Court specifically declined to add theft and burglary to a list of conduct that indicates dishonesty, warning against the use of reasoning that would allow "any criminal act" to be admissible to prove untruthfulness. Gollehon, 262 Mont. at 16, 864 P.2d at 259.

Furthermore, given Montana's prohibition on the admissibility of any conviction for impeachment purposes, trial courts in Montana must be careful to avoid allowing "thinly-veiled proposed questioning of [a witness's] prior

convictions without mentioning the word 'conviction.'" Gollehon, 262 Mont. at 16, 864 P.2d at 259 (quoted in Martin, 279 Mont. at 200, 926 P.2d at 1390). That is precisely what the trial court was avoiding in this case. McClelland presented nothing about Wendy's prior *conduct* in improperly issuing bank checks that showed it was "probative of truthfulness or untruthfulness" in the context of this case; rather he proposed to ask thinly-veiled questions about a prior *conviction*. The fact that McClelland has relied exclusively on cases from other jurisdictions dealing with *convictions* under Rule 609, not *conduct* under Rule 608, underlines that point. As the Montana Commission on Evidence stated: "The Commission does not accept as valid the theory that a person's willingness to break the law can automatically be translated into willingness to give false testimony." Commission Comments, Mont. R. Evid. 609 (citation omitted).

The district court made a reasoned and conscientious decision regarding cross-examination of Wendy, relying on this Court's decisions in Martin and Gollehon. The facts of this case were very similar to those in Gollehon. There, this Court found no abuse of discretion where the trial court refused to allow the defendant to cross-examine one of the State's eyewitnesses to a beating death about prior acts of theft and burglary. Gollehon, 262 Mont. at 16, 864 P.2d at 258-59.

The Gollehon Court relied in turn on State v. White, 202 Mont. 491, 496, 658 P.2d 1111, 1113 (1983). That Court noted that Montana's Rule 608(b) exception, allowing cross-examination about specific instances of past conduct, is "narrowly drawn in recognition of the opportunities for abuse." White, 202 Mont. at 496, 658 P.2d at 1113 (quoting 10 Moore's Federal Practice 608.21, at VI-89 (Oct. 1976)). In White, the Court found that the trial court had abused its discretion in allowing an eyewitness to an altercation in a bar to be cross-examined as to the witness's previous misconduct in the bar. Id. The Court stated that the witness's previous misconduct "was wholly unrelated to the ability of [the witness] to observe, recall or testify as to any relevant occurrences in the altercation between [the defendant and the victim]." Id. (quoted in Gollehon, 262 Mont. at 16, 864 P.2d at 258).

This need to weigh the probative value of a witness's prior conduct in the context of a case was recently reaffirmed in State v. Schauf, 2009 MT 281, ¶ 33, 352 Mont. 186, 216 P.3d 740, where the Court held that the cross-examination of an eyewitness about a pending charge of fraudulently obtaining prescription medication was properly prohibited where "[t]he . . . charge against [the witness] was unrelated to [the defendant's] case and did not bear upon his ability to observe on the night of the accident or to recall and testify to the circumstances."

In McClelland's case, just as in Gollehon and Schauf, the defendant failed to show how Wendy's writing of bad checks some years earlier had any relationship to McClelland's case or bore upon Wendy's ability to observe, recall, or testify truthfully to what had occurred during the altercation between McClelland and Tallis. The district court acted well within its discretion in prohibiting cross-examination about the bad checks.

II. THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR UNDER THE CONFRONTATION CLAUSE WHEN IT PROHIBITED McCLELLAND FROM CROSS-EXAMINING ONE OF THE STATE'S EYEWITNESSES ABOUT CONDUCT THAT LED TO A CONVICTION FOR ISSUING BAD CHECKS TEN YEARS EARLIER.

A. Standard of Review

McClelland argues for the first time on appeal that the evidentiary ruling of the district court denied him the right to effective cross-examination under the Confrontation Clause. See Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986); State v. Slade, 2008 MT 341, ¶ 26, 346 Mont. 271, 194 P.3d 677. This Court does not generally address new legal theories raised by an appellant for the first time on appeal. State v. Dewitz, 2009 MT 202, ¶ 30, 351 Mont. 182, 212 P.3d 1040. McClelland argues that the claim is nevertheless cognizable under the common law plain error doctrine of State v. Finley, 276 Mont. 126, 137, 915 P.2d 208, 215 (1996). Plain error review is reserved for exceptional cases, and is applied

sparingly, on a case-by-case basis. Town of Columbus v. Harrington, 2001 MT 258, ¶ 12, 307 Mont. 215, 36 P.3d 937; State v. Gerstner, 2009 MT 303, ¶ 22, ___ Mont. ___, 219 P.3d 866.

In determining the applicability of the plain error doctrine, the Court considers the totality of the circumstances of the case. Harrington, ¶ 12. The plain error doctrine is only used if the failure to review the claimed error may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process. Gerstner, ¶ 22 (citing State v. West, 2008 MT 338, ¶ 23, 346 Mont. 244, 194 P.3d 683).

B. This Case Is Not Appropriate for Plain Error Review.

The permissibility of cross-examining Wendy about the fact she had written some bad checks in the past is reviewable under the "abuse of discretion" standard. See Argument I, supra. There is nothing about this case that would require further review under the state or federal constitution in order to avoid a "manifest miscarriage of justice." It is simply not reasonable to believe that the jury's lack of knowledge that Wendy had written some bad checks many years earlier leaves unsettled the fundamental fairness of the trial or compromises the integrity of the judicial process.

Wendy was one of four witnesses, including Tallis, who gave consistent accounts of the events of that afternoon. Tallis was injured; McClelland was not, despite the fact that Tallis was clearly the stronger of the two. (See, e.g., Trial Tr. at 310.) That physical evidence alone casts serious doubt on McClelland's story, which changed frequently when he spoke to law enforcement officials immediately after the incident. (See Trial Tr. at 208; State's Ex. 8, 10, 12.) The photograph that Wendy took at the beginning of the confrontation contradicted McClelland's claim that Tallis had helped to knock down the "Slow" sign (Trial Tr. at 327-28), as it showed that the "Slow" sign was already on the ground before Tallis and McClelland even met at the fence. (State's Ex. 1.)

The jury was clearly aware of the potential for bias based on the fact that Wendy was Tallis's wife, but determined that Wendy was credible anyway. McClelland's claim that "the jury likely would have re-assessed [Wendy's] credibility" had it known of her past history of writing bad checks is totally speculative and without basis in the case. Cf. State v. Gollehon, 262 Mont. 1, 17, 864 P.2d 249, 259 (1993) (rejecting as "totally speculative" the argument that cross-examination of an eyewitness about his prior thefts and burglaries was "a crucial line of questioning"). This Court should not use its power of plain error review to address McClelland's "right to effective cross-examination" as a constitutional claim.

C. **There Was No Confrontation Clause Violation.**

It is well established under both the U.S. and Montana Constitutions that:

> trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. And as we observed earlier this Term, "the Confrontation Clause guarantees an *opportunity* for cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (*per curiam*) (emphasis in original).

Van Arsdall, 475 U.S. at 679 (emphasis added) (quoted in State v. Wilson, 2007 MT 327, ¶ 45, 340 Mont. 191, 172 P.3d 1264); accord Holmes v. South Carolina, 547 U.S. 319, 326-27 (2006).

The district court in McClelland's case prohibited the cross-examination of Wendy about her past history of bad checks because it was not sufficiently "probative of truthfulness or untruthfulness" to impeach her credibility. (Appellant's App. 1 at 3.) That decision imposed a reasonable limit based on traditional evidentiary rules that are "familiar and unquestionably constitutional." See Montana v. Egelhoff, 518 U.S. 37, 42 (1996) (plurality opinion).

In addition to the limited probative value of questioning Wendy about her check-writing nearly ten years earlier, such questioning would undoubtedly have other undesirable results. Just as with impeachment by conviction, the type of impeachment that McClelland sought here would "cause severe embarrassment on

the part of the witness. . . . The fact that the witness can explain his [conduct] can simply add to the embarrassment and is no help." Commission Comments, Mont. R. Evid. 609. Allowing such severe embarrassment where the questioning has little or no probative value would violate a trial court's duty to protect witnesses from harassment or undue embarrassment. Mont. R. Evid. 611(a)(3). Furthermore, such impeachment "can lead to confusion by jury members who see no connection between [that conduct] and the case or to undue prejudice . . . ." Id.

McClelland has failed to show how the district court's routine evidentiary decision based on probative value was so divorced from legitimate interests in the criminal trial process as to be deemed unreasonable, "arbitrary," or "disproportionate." Cf. Holmes v. South Carolina, 547 U.S. at 326 (the Constitution prohibits the exclusion of defense evidence under rules that "serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote"). In State v. Short, this Court said:

> A witness's credibility may be attacked through cross-examination to reveal possible biases, prejudices, or ulterior motives if they relate directly to issues or personalities in the case at hand. . . . However, the extent of cross-examination on whether a witness has been accused of another or prior crime is within the trial court's discretion. . . . The extent of cross-examination for these purposes is restricted because of the limited probative value in relation to credibility.

State v. Short, 217 Mont. 62, 67, 702 P.2d 979, 982 (1985) (emphasis added; citations omitted; quoted in Sloan v. State, 236 Mont. 100, 104-05, 768 P.2d 1365, 1368 (1989)).

McClelland has not cited any cases in which a limitation on cross-examination similar to the one imposed in this case was held to violate the Confrontation Clause. See Olden v. Kentucky, 488 U.S. 227, 229-30 (1988) (trial court prohibited introduction of evidence that the witness and victim were living together at the time of trial); Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) (trial court prohibited all inquiry into the possibility that witness would be biased as a result of the State's dismissal of his public drunkenness charge); Davis v. Alaska, 415 U.S. 308, 317-18 (1974) (trial judge prohibited development of a claim of bias due to undue pressure because of the witness's vulnerable status as a probationer and because of the witness's possible concern that he might be a suspect in the investigation); Slovik v. Yates, 545 F.3d 1181, 1186-87 (9th Cir. 2008) (trial judge prohibited cross-examination of the victim/witness concerning the fact he was on probation, after he lied under oath, saying that he was not on probation); Fowler v. Sacramento County Sheriff's Dep't, 421 F.3d 1027, 1032-33 (9th Cir. 2005) (trial court prohibited cross-examination of the child victim/witness about two unfounded accusations she had made earlier that were similar to the allegations against the defendant).

There was no error under the Confrontation Clause in prohibiting McClelland from cross-examining Wendy about her check-writing conduct ten years earlier, let alone "plain error."

III. McCLELLAND WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review and Applicable Law

This Court reviews claims of ineffective assistance of counsel de novo as mixed questions of law and fact. State v. Green, 2009 MT 114, ¶ 14, 350 Mont. 141, 205 P.3d 798.

To establish ineffective assistance of counsel, a defendant has the burden of meeting both prongs of the two-part test established in Strickland v. Washington, 466 U.S. 668, 687 (1984) --(1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defendant. Hardin v. State, 2006 MT 272, ¶ 18, 334 Mont. 204, 146 P.3d 746.

To establish deficient performance, the defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, considering all the circumstances. Whitlow v. State, 2008 MT 140, ¶ 14, 343 Mont. 90, 183 P.3d 861. The attorney's errors must have been "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. "Judicial scrutiny of

counsel's performance must be highly deferential." Strickland, 466 U.S. at 689. The reviewing court must indulge a strong presumption that counsel's conduct fell within the wide range of professionally competent assistance and was based on sound strategy. Id. (cited in Whitlow, ¶ 21). The defendant has the burden of overcoming that presumption. Id. In determining whether counsel's performance was deficient, it is important to judge the reasonableness of counsel's performance "on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690.

To establish prejudice, the defendant must show a reasonable probability that, but for counsel's unprofessional conduct, the result of the proceedings would have been different. State v. Rose, 2009 MT 4, ¶ 115, 348 Mont. 291, 202 P.3d 749. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Robinson v. State, 2010 MT 51, ¶ 13, 355 Mont. 326, ___ P.3d ___. The prejudice inquiry focuses on whether counsel's deficient performance renders the proceedings fundamentally unfair or the results of the proceedings unreliable. Rose, ¶ 115.

B. McClelland's Counsel Did Not Perform Deficiently by Failing to Subpoena Sue Swenson, Who Had Agreed to Testify Voluntarily.

1. Background

From February 19, 2008 until approximately November 20, 2008, both parties in this case believed that it would be resolved through a plea agreement. (D.C. Docs. 9, 14.) Toward the end of that period of time, however, McClelland informed his counsel that he wanted to proceed to trial rather than accept any plea agreement. (D.C. Doc. 14 at 1.) Preparations for trial resumed, and a trial was scheduled for March 30-31, 2009. (D.C. Doc. 18 at 2.)

On March 6, 2009, the State moved to file an amended information, listing Corinne Anderson as a witness for the State for the first time. (D.C. Docs. 28, 36.) The motion was granted, and the amended information was filed on March 11, 2009. (D.C. Docs. 35-36.)

On March 20, 2009, defense counsel moved to exclude all testimony from Corinne Anderson and the other newly-named witnesses on the grounds "that the prosecution has provided the names of these witnesses and their statements in an untimely manner." (D.C. Doc. 44 at 1.) On March 25, 2009, with that motion still pending, defense counsel submitted its list of witnesses, listing only Helen Newberry (McClelland's caretaker), and "[a]ll witnesses listed by the State." (D.C. Doc. 49.) On March 27, 2009, the Friday before trial was to begin on

Monday, the district court denied the defense motion to exclude Corinne Anderson, finding "that the defense has an investigator, that the investigator interviewed persons in the Dugout Gulch area, and that the State's evidence of these witnesses was provided to the defense within days of obtaining it and 20 days prior to trial." (D.C. Doc. 50 at 6.)

On the morning of the first day of trial, defense counsel asked to add Sue Swenson (Swenson) to McClelland's list of witnesses, claiming that she "would testify . . . that she had a conversation with Corinne Anderson the day this occurred and that Corinne Anderson advised her she witnessed the whole altercation and that she did see Mr. Tallis begin to duck under the fence and that's when he was hit with the cane." (Trial Tr. at 8-9.) Defense counsel had not pursued Sue Swenson as a witness until Corinne Anderson had been interviewed by the State, because Swenson had indicated earlier "that she didn't want to testify." (Trial Tr. at 9.) When defense counsel contacted her over the weekend before trial, Swenson "said, although she's somewhat reluctant to come in, she would if she was allowed to testify." (Trial Tr. at 9.)

The district court asked whether law enforcement had interviewed Swenson. (Trial Tr. at 9.) The prosecutor responded:

> No. Her name has come up in terms of--only in the context of I was trying to identify the person that was living with [McClelland] at the time, who turned out to be Helen Newberry, who has been listed by [defense counsel] and the defense. But that's it. I mean the name,

> you know, came up. Her husband had actually called our office and had an inquiry of a legal nature about, you know, Mr. McClelland's constitutional right to a speedy trial and some other things, and I never took that call. So I've heard the Swenson name, but that's it, Judge, nothing else.

(Trial Tr. at 9-10.) The prosecutor opposed allowing Swenson to testify, arguing "It's in the last hour. We haven't had an opportunity to sit down and visit and see how that's going to fit in." (Trial Tr. at 10.) After some discussion, the judge commented, "It's pretty late in the game," to which defense counsel responded, "And so is Corinne Anderson." (Trial Tr. at 11.)

Eventually, the judge ruled that if the defense could make Swenson available for an interview with the prosecutor, he would "consider it further." (Trial Tr. at 11-12.) By the end of the day, the prosecutor and defense counsel had agreed to make arrangements for Swenson to come in to meet with the prosecutor for about ten minutes the next morning. (Trial Tr. at 266-67.)

The next morning at 8:50 a.m., the prosecutor told the judge: "The report is, Judge, I spoke with Ms. Swenson last night, and she seemed fairly affable, a little hesitant maybe, but we made an appointment to visit. [Defense counsel] made his effort, but she just hasn't shown up." (Appellant's App. 2 at 273.) Defense counsel added: "I spoke with her last night, and she advised me she knew where the county attorney's office was and she wouldn't have a problem meeting with him about 8:30, and we just haven't seen her." (Id.) The prosecutor said: "She, in

quite a bit of detail, knew how to come here, so between [defense counsel] and myself--I mean I've been waiting since 8:30." (Id.)

Defense counsel indicated that he would still like to use Swenson as a witness "if she shows." (Id.) The district court denied that request. (Appellant's App. 2 at 273-74.) There is no indication in the record whether Swenson contacted the county attorney, defense counsel, or the court before the trial ended.

2. Counsel's Performance Was Not Deficient.

McClelland has not overcome the presumption that his counsel's conduct fell within the wide range of professionally competent assistance and was based on sound strategy. In hindsight, it might have been preferable to try to have Sue Swenson served with a subpoena. But "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689.

In McClelland's case, there was no reason for defense counsel to call Sue Swenson as a witness unless the State called Corinne Anderson. Swenson was not an eyewitness to the events of October 28, 2007, and her claimed testimony concerning Anderson's statements was inadmissible hearsay unless it was introduced for the purpose of impeachment. Mont. R. Evid. 801(c)-(d).

As soon as Anderson was named as a potential witness for the State on March 11, 2009, defense counsel began trying to contact Swenson, who had already indicated she did not want to testify at McClelland's trial. At the same time, defense counsel sought to exclude Anderson from testifying altogether by filing a motion on March 20, 2009. That motion was not denied until March 27, 2009. By this time, all the subpoenas had been issued and served. (D.C. Docs. 29-34, 37-38, 40.1, 42.) There was clearly insufficient time to schedule and conduct a deposition. With only the weekend left before trial, defense counsel did finally reach Swenson and persuaded her to be a witness. The night before her scheduled testimony, both defense counsel and the prosecutor spoke to Swenson, who agreed to come the next day to be interviewed and testify. Under these circumstances, it cannot be said that defense counsel's conduct in failing to subpoena Swenson fell below an objective standard of reasonableness under prevailing professional norms.

McClelland appears to suggest a "nothing to lose" standard for determining the reasonableness of defense counsel's performance. (Appellant's Br. at 22.) The U.S. Supreme Court has "never established anything akin to the . . . 'nothing to lose' standard for evaluating Strickland claims," and this Court should not adopt such a standard. See Knowles v. Mirzayance, 129 S. Ct. 1411, 1419 (2009). "The law does not require counsel to raise every available nonfrivolous defense." Knowles v. Mirzayance, 129 S. Ct. 1411, 1422 (2009) (citing Jones v. Barnes,

463 U.S. 745, 751 (1983) (issues on appeal) and Wiggins v. Smith, 539 U.S. 510, 533 (2003) (mitigating evidence)). Similarly, the law should not require counsel to subpoena every available potential witness.

In any event, it is clear that defense counsel does have something to lose if a witness is subpoenaed against his or her wishes--the cooperation of that witness. See Trial Tr. at 9 (defense counsel said: "It's been my experience with recalcitrant witnesses, I guess, that they usually don't serve much purpose"). Courts considering the failure of defense counsel to subpoena a witness have acknowledged that "[t]rial attorneys often choose not to subpoena a willing witness in order to avoid the possible intimidating effect, preferring instead to informally request the witness's presence at trial." Kubat v. Thieret, 867 F.2d 351, 361 (7th Cir. 1989) (cited in People v. Jones, 579 N.E.2d 829, 837 (Ill. 1991)). As the Seventh Circuit has noted: "[I]t is within the purview of allowable strategy for trial counsel to chose [sic] *not* to subpoena a witness who is friendly, or reluctant, or would otherwise react negatively to being 'ordered' to appear." United States ex rel. Partee v. Lane, 926 F.2d 694, 702 (7th Cir. 1991) (emphasis in original; citing Kubat, supra; superseded on other grounds by the Antiterrorism and Effective Death Penalty Act of 1996).

McClelland's reliance on cases involving defense counsel's failure to impeach a government witness is misplaced. (Appellant's Br. at 16.) Those cases

all involve situations where a government witness had previously made statements to law enforcement investigators or at a previous trial that were inconsistent with his or her testimony at trial, but the defense counsel failed to use those readily-available prior statements for impeachment purposes. Driscoll v. Delo, 71 F.3d 701, 710 (8th Cir. 1995) (defense counsel was aware that witness had made prior inconsistent statements to two investigating officers, but did not question the witness about them at trial); Moffett v. Kolb, 930 F.2d 1156, 1157, 1161 (7th Cir. 1991) (defense counsel failed to introduce prior inconsistent statements of state witness, who twice told the investigating detective that it was someone other than the defendant who fired the gun); Nixon v. Newsome, 888 F.2d 112, 115 (11th Cir. 1989) ("[f]aced with glaring and crucial discrepancies between [the witness's] testimony at the two trials, the attorney failed to follow up on his cross-examination"); Smith v. Wainwright, 799 F.2d 1442, 1444 (11th Cir. 1986) (neither of two witnesses "were subjected to impeachment by their prior statements to the police, which were remarkably inconsistent with their trial testimony"); United States v. Tucker, 716 F.2d 576, 585 (9th Cir. 1983) ("each of the key government witnesses had given statements or affidavits to government investigators which raised questions as to their credibility or which were more supportive of [the defendant's] theory of defense than the testimony they gave at

trial," but "[n]one of these prior inconsistent statements was brought to the jury's attention").

Corinne Anderson had never given a prior statement to investigators or at an earlier trial that was inconsistent with her trial testimony here. See State's Ex. 14, 16; Trial Tr. at 243-65. Unlike the defense counsel in the cases cited above, McClelland's counsel did not have the option of impeaching Anderson with her prior statements to investigators. Instead, he pursued a strategy of trying to exclude Anderson's testimony altogether, or, alternatively, persuading Swenson to testify, since she claimed that Anderson had made an inconsistent statement to her. See Strickland, 466 U.S. at 690 ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.") Although, in hindsight, the strategy was unsuccessful, it did not fall beneath an objective standard of reasonableness under the circumstances. McClelland has not met the first prong of the Strickland standard.

2. McClelland Has Failed to Establish Prejudice.

McClelland has not shown a reasonable probability that, but for counsel's failure to subpoena Sue Swenson, the result of the proceedings would have been different. First of all, even if Sue Swenson had been subpoenaed, that would have been no guarantee that she would appear for trial and testify as McClelland's

counsel believed. See, e.g., Coons v. State, 758 S.W.2d 330, 333-34 (Tex. Ct. App. 1988) (witnesses were subpoenaed but failed to appear; record does not contain any affidavits describing what testimony would have been given); United States v. Cockrell, 720 F.2d 1423, 1427 (5th Cir. 1983) (witness was subpoenaed but failed to appear; "allegations of what a witness would have testified are largely speculative").

Secondly, even if Sue Swenson had testified as McClelland now contends, there is no reasonable probability that the outcome would have been different. There is some indication in the record that Swenson had a close relationship to McClelland. See Trial Tr. at 10 (Swenson's husband had called the county attorney's office to inquire about McClelland's speedy trial rights). Even if Swenson were considered by the jury to be a "neutral observer," it is not reasonable to conclude that her limited testimony probably would have changed the jury's entire view of the credibility issue. See Kubat v. Thieret, 867 F.2d 351, 364 (7th Cir. 1989) ("individuals who are close friends or associates of a party are the least desirable impeachment witnesses because of the ease with which their testimony can be discredited").

Anderson was only one of four different individuals who testified that Tallis had not threatened McClelland or tried to duck under the fence to come after him. Swenson's testimony just would have added one more credibility determination to

the jury's consideration, since Anderson already testified on cross-examination that she had never told anybody that Tallis was trying to duck under the fence when McClelland hit him. The idea that Swenson's testimony would sway the jury's view not only of Anderson, but of all the rest of the State's witnesses is not reasonably probable.

Furthermore, McClelland's own testimony, together with his prior statements (Trial Tr. at 290-340; State's Ex. 8, 10, 12), was so inherently incredible that there is no reasonable probability that Swenson's one hearsay statement would have changed the outcome of this trial. McClelland's statements were inconsistent on even the most basic issue of whether he had actually hit Tallis with his cane. See, e.g., Trial Tr. at 303, 337-39 (alleging Tallis hit his head on the insulator on the fence post). Further examples of inconsistencies involved issues such as whether McClelland stopped his four-wheeler on the road because of mechanical difficulties, or Tallis came out and "waylaid" him (Trial Tr. at 296-97, 319-20, 335), who tore down the "Slow" sign (Trial Tr. at 299, 319, 325-28), where they were standing when McClelland swung at Tallis with his cane (Trial Tr. at 300, State's Ex. 8 at 1-2), and what happened with the shotgun, if anything. (Trial Tr. at 297, 316-17; State's Ex. 8 at 2; State's Ex. 10 at 1-2.) McClelland also testified that he approached Tallis's property "to try to face him off at the

fence" because he was afraid Tallis would beat him up if he stayed in the road on his four-wheeler. (Trial Tr. at 298.)

Given the uncertainty of Swenson's claimed testimony even if she had been subpoenaed, the inherent weakness of McClelland's testimony, and the strength of the State's evidence, there is no reasonable probability that, but for counsel's failure to subpoena Sue Swenson, the result of the proceedings would have been different. Her testimony, had she appeared and given it as claimed, would not have undermined confidence in the outcome of this case.

C. McClelland's Counsel Did Not Provide Ineffective Assistance by Failing to Raise Additional Theories in Favor of Cross-Examining One of the State's Eyewitnesses About Conduct Which Led to a Conviction for Issuing Bad Checks Ten Years Earlier.

1. Counsel's Performance Was Not Deficient.

McClelland contends that his counsel should have made additional arguments in favor of allowing Wendy to be impeached by her past bad check conviction, citing the Washington state cases that are cited in this appeal, and should have argued the issue under the Confrontation Clause. (Appellant's Br. at 35-37.)

Counsel cannot be faulted for failing to raise an unsettled or debatable theory of law. See, e.g., Murtishaw v. Woodford, 255 F.3d 926, 949-50 (9th Cir. 2001) (no deficient performance in failing to raise an obscure, uncertain, and

undeveloped self-defense theory); United States v. Chambers, 918 F.2d 1455, 1461 (9th Cir. 1990) (no deficient performance where, at time of trial, the case on which defendant relies had not been decided); see also Fields v. United States, 201 F.3d 1025, 1028 (8th Cir. 2000) (no deficient performance for failure to object where the law is unsettled on a subject).

This is especially so if the unsettled or debatable theory of law is based on cases from other jurisdictions, as McClelland's theory is. In Larrea v. Bennett, 368 F.3d 179, 184 n.2 (2d Cir. 2004), for example, the Second Circuit explicitly rejected the idea "that a reasonable attorney must be familiar with authority from jurisdictions other than her own."

As indicated above, Argument I. and II., McClelland's theories are without merit in any event. The decision whether Wendy could be impeached by her stale bad check conviction was a routine evidentiary decision that clearly lay within the discretion of the trial court. Mont. R. Evid. 608(b); Van Arsdall, 475 U.S. at 679 (trial judges retain wide latitude to impose reasonable limits on cross-examination). McClelland's counsel made a competent professional effort to allow the information in by researching Rule 609 and opposing the State's motion in limine based on Montana case law. (D.C. Doc. 48 at 1.) McClelland has not met his burden of showing that his counsel's performance fell outside the wide range of professionally competent assistance required under the Sixth Amendment. See

State v. Crosley, 2009 MT 126, ¶ 56, 350 Mont. 223, 206 P.3d 932 (no ineffective assistance of counsel for failing to raise objections or requests concerning the admissibility of evidence that are without merit).

2. McClelland Has Failed to Establish Prejudice.

As with McClelland's ineffective assistance of counsel claim concerning Sue Swenson, McClelland has not shown a reasonable probability that, but for counsel's failure to make additional arguments in favor of allowing cross-examination of Wendy concerning a stale bad check conviction, the result of the proceedings would have been different. There is no reasonable probability that those arguments would have prevailed. As argued above, they would have been rejected as meritless in any event.

Even if the arguments had been successful, and counsel had been permitted to cross-examine Wendy about writing bad checks, it is not reasonably probable that the jury would have chosen to reject the clear, consistent testimony of the State's witnesses and to believe the incredible testimony of McClelland just because one of the State's witnesses had written some bad checks ten years earlier. The fact that Wendy had written some bad checks does not "undermine confidence in the outcome" of this case.

VI. THE CUMULATIVE ERROR DOCTRINE DOES NOT ENTITLE McCLELLAND TO A NEW TRIAL.

The cumulative error doctrine refers to a situation in which a number of trial errors, each of which is harmless in isolation, prejudices a defendant's right to a fair trial when taken together. See State v. Tennell, 2007 MT 266, ¶¶ 30-31, 339 Mont. 381, 170 P.3d 965. Inherent in this doctrine is that the errors as well as the cumulative prejudice must be established by the defendant. "[M]ere allegations of error are inadequate to satisfy the doctrine." Tennell, ¶ 31. Where each allegation of error has been rejected separately on the merits, application of the cumulative error doctrine is inappropriate. State v. Novak, 2005 MT 294, ¶ 36, 329 Mont. 309, 124 P.3d 182.

In McClelland's case, as indicated above, none of his allegations of error have merit. The district court acted within its discretion in excluding evidence of the conduct underlying Wendy's stale bad check conviction. Defense counsel provided effective assistance. There being no error, the doctrine of cumulative error is inapplicable.

Even if there had been error involved in McClelland's inability to impeach Anderson with Sue Swenson's proffered testimony and Wendy with her bad check conduct, both errors together would be harmless beyond a reasonable doubt. "The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that

the error was harmless beyond a reasonable doubt." Delaware v. Van Arsdall, 475 U.S. at 684; cf. State v. Van Kirk, 2001 MT 184, ¶¶ 36-47, 306 Mont. 215, 32 P.3d 735 (establishing the test for harmless error where evidence was erroneously admitted).

In this case, in the primary credibility contest between McClelland and Tallis, there is no question that Tallis's testimony was more credible, regardless of the testimony of others. The physical injury to Tallis, the photograph showing that McClelland had pulled down the "Slow" sign and started to walk toward the Tallis's driveway/road before Tallis even reached the fence, and Tallis's clear, consistent, and believable account of what occurred all pointed to the credibility of his testimony. On the other hand, as the jury found, McClelland's confusing, often internally inconsistent account, was not credible.

The district court in this case did not prevent McClelland from cross-examining Wendy at all, as in Whelchel v. Washington, 232 F.3d 1197, 1203 (9th Cir. 2000) (witnesses did not testify, but their tape-recorded statements to police were played for the jury). Nor did the district court prevent McClelland from cross-examining Wendy about a particular bias related to the case at hand, as in Olden v. Kentucky, 488 U.S. 227, 230 (1988) (victim and witness were living together at the time of trial); Fowler v. Sacramento County Sheriff's Dep't, 421 F.3d 1027, 1032-33 (9th Cir. 2005) (victim had made earlier similar

accusations that were unfounded); or United States v. Adamson, 291 F.3d 606, 612-13 (9th Cir. 2002) (cross-examination of codefendant would have cast doubt on in-court testimony and raised questions about his motivation to testify).

It is clear that the general attack on Wendy's credibility that McClelland sought to make would not have had the harmful impact of evidence that Wendy had previously lied under oath, or a particular attack designed to reveal possible biases, prejudices, or ulterior motives of the witness "as they may relate directly to issues or personalities in the case at hand." See Fowler, 421 F.3d at 1043 (citing Davis v. Alaska, 415 U.S. 308, 316 (1974)). Similarly, Sue Swenson's proffered testimony about a conversation with a neighbor would not have had the harmful impact of a prior inconsistent statement to the police or a jury, which was verifiable, as in Driscoll v. Delo; Moffett v. Kolb; Nixon v. Newsome; Smith v. Wainwright; or United States v. Tucker.

Neither the fact that Wendy had written some bad checks years before, nor the fact that a neighbor who was not at the incident remembered that one of the witnesses told her that Tallis had started to duck under the fence when he was hit, nor both considered cumulatively, would be the type of impeachment that would have the potential to realize damage to the State's case in light of the quality of the other evidence presented.

Even if the jury had discounted the testimony of Wendy and Anderson, there was Tallis's testimony, the photograph showing that McClelland had torn down the "Slow" sign before Tallis ever reached him, and the fact that Tallis was injured and McClelland was not--all evidence that was qualitatively better and proved the same facts as Wendy's and Anderson's testimony. Cf. Van Kirk, ¶ 47 ("the fact-finder was presented with admissible evidence that proved the same facts as the tainted evidence and, qualitatively, by comparison, the tainted evidence would not have contributed to the conviction"). If any error was committed in this case, which the State disputes, it was cumulatively harmless beyond a reasonable doubt.

CONCLUSION

The State of Montana respectfully requests that McClelland's convictions be affirmed.

Respectfully submitted this 3rd day of May, 2010.

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By: _____
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be mailed to:

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(Hand-delivered into the wire basket located in the reception area in the Attorney General's Office, 215 North Sanders, Helena, Montana 59620.)

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DATED:_____ _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 9,074 words, excluding certificate of service and certificate of compliance.

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SHERI K. SPRIGG